PARAMILL SDN BHD & ANOR A

v.

DATUK JOSEPH PAIRIN KITINGAN

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI JC
[SUIT NO: K22-160-1998]
25 AUGUST 2009

LAND LAW: *Transfer - Beneficial ownership - Whether claim to land contrary to s. 88 Land Ordinance (Cap 68) (Sabah) - Fraud - Limitation, whether claim time-barred* C

LIMITATION: *Land - Transfer of land - Accrual of cause of action - Whether action time-barred* D

EQUITY: *Maxims of equity - Equity will not permit statute to be used as an engine of fraud - Transfer of land to rightful owner*

In 1976, pursuant to a scheme proposed by the then Chief Minister of Sabah, Datuk Harris Salleh, a parcel of land was E bought and registered in the joint names of 40 persons including Datuk Harris Salleh, the defendant and the 2nd plaintiff with each (except Datuk Harris Salleh) holding a 1/44 undivided share. The plaintiffs contended that the defendant opted out of the scheme when he refused to pay the land and development costs. The F defendant's share, Lot A7, was then re-allotted to the 2nd plaintiff (in addition to his allotted share of Lot A8), who duly paid all the costs for both lots. Upon subdivision, Lot A7 was registered in the defendant's name but the document of title given to the 2nd plaintiff as he was the one who actually paid for the land and G development costs. Upon the 2nd plaintiff's failure to get the defendant to execute a memorandum of transfer of Lot A7 to him or his nominee, he brought this action seeking the same.

The following were the agreed issues to be tried: (i) whether the H purchase price and the development costs for the said land were paid by the 2nd plaintiff for the defendant (first issue); (ii) if the answer to the first issue was in the affirmative, whether the plaintiffs' claims for the said land were contrary to and thereby invalidated by s. 88 of the Land Ordinance (Cap 68) (Sabah) I ('Land Ordinance') (second issue); and (iii) if the answer to the

second issue was in the negative, whether the 2nd plaintiff's claim was barred by s. 3 and/or s. 26 of the Limitation Ordinance 1952 (third issue). At the conclusion of the trial, the High Court judge decided the first issue in favour of the defendant after finding that the plaintiffs failed to prove the 2nd plaintiff had paid for the said land, and in view of that finding did not deal with the remaining two issues. On appeal, the Court of Appeal reversed the judgment of the High Court and the first issue was decided in the plaintiffs' favour. The case was then remitted to the High Court to decide on the second and third issues.

Held (in favour of the plaintiffs):

(1) The Federal Court in *Lin Nyuk Chan v. Wong Sz Tsin* made it clear that an interest arising out of an unregistered document is not affected by s. 88 of the Land Ordinance. In the instant appeal, the 2nd plaintiff could not register his equitable and beneficial interest in the land since the defendant was unwilling to transfer it to him. The defendant was obviously taking advantage of his own wrong by refusing to transfer the land to the 2nd plaintiff. This amounted to the defendant using the statute as an engine of fraud, which could not be condoned. He did not pay for the land but refused to transfer it to the person who paid for it. Clearly, his conduct was unconscionable and unmeritorious. Therefore, the answer to the second issue was in the negative. *Lin Nyuk Chan v. Wong Sz Tsin* (foll); *Sin Siew Hong v. Lim Gin Chian* (foll). (paras 13, 14, 15 & 16)

(2) As the 2nd plaintiff commenced this action in June 1998, there was no basis for the defendant to argue that the plaintiffs' claim was time-barred. On the contrary, it is the defence of limitation itself that is barred by s. 9 of the Ordinance. Further, the defendant as a constructive trustee could not plead limitation as a defence. Article 97 of the First Schedule to the Ordinance also favoured the plaintiffs. It provides that where no period of limitation is provided elsewhere in the Schedule, the period of limitation is six years from the date the right to sue accrues. In the present case, the right to sue only accrued on 9 January 1998, the date the defendant wrote and claimed that as far as he could recall he had fully paid for the purchase price of the disputed land and denied that he was holding the land on trust for the 2nd

plaintiff. As known now, the defendant's claim that he had fully paid for the disputed land had been found to be untrue by the Court of Appeal. For the above reasons, the answer to the third issue must also be in the negative. *Khor v. Haji Yasin* (foll); *MT Bolo v. MT Koklan* (foll); *Tan Swee Lan v. Engku Nik Engku Muda* (foll). (paras 19, 20, 21, 22 & 23)

[Order accordingly.]

Case(s) referred to:
Besharapan Sdn Bhd v. Agroco Plantation Sdn Bhd & Anor [2006] 4 CLJ 878 CA ***(refd)***
Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***
Khor Kuek Jin v. Haji Yasin & Ors [1976] 1 LNS 51 FC ***(foll)***
Lin Nyuk Chan v. Wong Sz Tsin [1964] 1 LNS 94 FC ***(foll)***
MT Bolo v. MT Koklan [1930] AIR 270 ***(foll)***
Sin Siew Hong & Ors v. Lim Gin Chian & Anor [1996] 3 CLJ 26 CA ***(foll)***
Tan Swee Lan v. Engku Nik Engku Muda [1973] 1 LNS 156 FC ***(foll)***
Wangsa Timber Industries Sdn Bhd v. Adulfast Anthony Robert & Anor [2001] 4 CLJ 498 CA ***(refd)***

Legislation referred to:
Land Ordinance (Cap 68) (Sabah), s. 88
Limitation Ordinance 1952, ss. 3, 9, 26, art. 97 of First Schedule

Limitation Act 1963 [Ind], art. 113

Other source(s) referred to:
Sanjiva Row's The Limitation Act 1963, 8th edn, p 831

For the plaintiffs - Colin Lau; M/s Colin Lau & Co
For the defendant - Yunuf Maringking; M/s Maringking & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Rahman Sebli JC:

[1] The brief factual background to this action is as follows. In 1976, Datuk Harris Mohd Salleh (Datuk Harris Salleh) the then Chief Minister of Sabah proposed a scheme to purchase a parcel of land measuring about 53.70 acres under subdivided title CL015376986. The scheme was to enable "the notables and associates" of Parti Berjaya of which Datuk Harris Salleh was the

leader to build their houses in Kota Kinabalu. In November 1976 the land was bought for RM1,500,000 which purchase was financed by a short term bank loan secured by a joint undertaking to repay by the selected prospective participants of the scheme

[2] The land was registered in the joint names of the 40 persons including Datuk Harris Salleh, the defendant Datuk Joseph Pairin Kitingan (as he then was) and the 2nd plaintiff, the late Tan Sri Datuk Wee Boon Ping (Tan Sri Wee) with each (except Datuk Harris Salleh) holding 1/44 undivided share with a view to its subdivision and intra-structural development and for individual titles to be subsequently issued to the respective owners upon payment of their proportionate land development costs to the law firm of Messrs Jayasuria Kah & Co. (Jayasuria Kah) who was appointed to manage the scheme and collect all payments.

[3] The plaintiffs contend that the defendant opted out of the scheme when he refused or neglected to pay the land and development costs. The defendant's share (later earmarked as Lot A7) was then reallotted to Tan Sri Wee (in addition to his allotted share of Lot A8) who had duly paid all the costs for both Lots A7 and A8. The disputed land is Lot A7.

[4] Upon subdivision the land was described as Lot 27 and registered in March 1985 in the defendant's name (he being one of the original co-owners named in the Master Title) but the document of title was given by Jayasuria Kah to Tan Sri Wee as he was the one who actually paid for the land and the development costs.

[5] Subsequently, with the assistance of Jayasuria Kah, Tan Sri Wee sought to get the defendant to execute a memorandum of transfer of Lot A7 to him or his nominee but failed. Hence this action for the following reliefs:

1. A declaration that the defendant holds the Lot A7 [CL.015430136] as Trustee for the plaintiffs;

2. An order that the defendant do forthwith execute a registrable memorandum of transfer of the said Lot A7 and deliver the same together with the new document of title to the plaintiffs' solicitors and cause the same to be registered in favour of the plaintiffs.

[6] The trial commenced before Justice Ian HC Chin on 28 February 2005 and the following were the agreed issues to be tried:

1. Whether the purchase price and the development cost for the said land were paid by Tan Sri Wee or by Parti Berjaya for the defendant (first issue).

2. If the answer to the first issue is that Tan Sri Wee paid for the purchase price and the development cost, whether Tan Sri Wee's and thereby Paramill's claims for the said land are contrary to and thereby invalidated by s. 88 of the Land Ordinance (Sabah Cap. 68) (second issue).

3. If the answer to the second issue is that Tan Sri Wee's and Paramill's claims are not contrary to and thereby not invalidated by s. 88 of the Land Ordinance, Tan Sri Wee's claim is barred by s. 3 and/or s. 26 of the Limitation Ordinance 1952 and therefore Paramill's claim.

[7] At the conclusion of the trial the learned judge decided the first issue in favour of the defendant after finding that the plaintiffs failed to prove that Tan Sri Wee had paid for the disputed land. In view of his finding on the first issue the learned judge did not deal with the remaining two issues. On appeal to the Court of Appeal the High Court's judgment was reversed and the first issue was decided in favour of the plaintiffs. The Court of Appeal was satisfied that there was sufficient evidence to establish on the balance of probability that Tan Sri Wee had paid for the land and the development costs for the disputed land.

[8] The case was then remitted back to the High Court to decide on the second and third issues. The case is before me now as Justice Ian HC Chin had since left the Judiciary. Since these are the only two issues that I am called upon to decide, I shall disregard all other issues raised by learned counsel for the defendant in his written submissions. In any event they are in my view irrelevant in so far as the second and third issues are concerned.

Second Issue

Whether The 2nd Plaintiff's And Thereby The 1st Plaintiff's Claims For The Said Land Are Contrary To And Thereby Invalidated By s. 88 Of The Sabah Land Ordinance (Cap 68) (The Land Ordinance)

[9] To begin with there can be no dispute, now that the Court of Appeal had decided in favour of the plaintiffs in respect of the first issue, that the land and development costs for the land had been paid by Tan Sri Wee. It is the plaintiffs' contention that the defendant was and still is holding the disputed land in trust for Tan Sri Wee and that as such his (Tan Sri Wee's) equitable and beneficial interest in the disputed land are not affected by s. 88 of the Land Ordinance although not registered thereunder. Section 88 of the Land Ordinance provides as follows:

> 88. No new title and no dealing with, claim to or interest in any land except land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.

[10] The question is whether this provision prohibits the creation of an equitable interest or right in land. There are several decided cases on this point, some by the highest courts in Malaysia. In *Lin Nyuk Chan v. Wong Sz Tsin* [1964] 1 LNS 94 the former Federal Court had to consider whether a lease which was not registered pursuant to s. 88 of the Land Ordinance was valid. The court held that it was valid and enforceable and that s. 88 does not affect contracts or agreements that are otherwise valid and enforceable. The Federal Court also held as follows:

(1) The unregistered instrument itself may give title in equity and an equitable right to enforce the agreement which must have existed when the instrument was executed;

(2) In view of s. 88 it was imperative that the court made an order of specific performance including an order that the respondent in that appeal executed a registrable memorandum of sublease.

[11] The decision in *Lin Nyuk Chan* was followed by the Federal Court in *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561. These two Federal Court decisions had been applied by the Court of Appeal in *Wangsa Timber Industries Sdn*

Bhd v. Adulfast Anthony Robert & Anor [2001] 4 CLJ 498 and in *Besharapan Sdn Bhd v. Agroco Plantation Sdn Bhd & Anor* [2006] 4 CLJ 878.

[12] Learned counsel for the defendant however argued that the decision in *Lin Nyuk Chan* has no application to the present case as, unlike *Lin Nyuk Chan* there is no valid contract or agreement between Tan Sri Wee and the defendant. In my view learned counsel's attempt to distinguish *Lin Nyuk Chan* and the present case is misconceived. Clearly the principle laid down in *Lin Nyuk Chan* covers any equitable or beneficial interest.

[13] Section 88 of the Land Ordinance does not make the distinction advocated by learned counsel for the defendant. Specifically it does not say that it has no application to unregistered equitable right arising out of a contract. With due respect to learned counsel he is importing words into s. 88 which are not there. In fact the Federal Court in *Lin Nyuk Chan* made it clear that an interest arising out of an unregistered document is not affected by s. 88 of the Land Ordinance.

[14] It is important to note that the defendant was and still is unwilling to transfer the disputed land to Tan Sri Wee. How then could Tan Sri Wee register his equitable and beneficial interest in the land? The defendant is obviously taking advantage of his own wrong by refusing to transfer the land to Tan Sri Wee. In this regard I agree with learned counsel for the plaintiffs that this amounts to the defendant using the statute as an engine of fraud, which the court must not condone. The defendant did not pay for the land and now refuses to transfer the land to the person who paid for it. Clearly the defendant's conduct is unconscionable and unmeritorious.

[15] It is trite principle that 'equity will not permit statute to be used as an engine of fraud'. The Court of Appeal in *Sin Siew Hong & Ors v. Lim Gin Chian & Anor* [1996] 3 CLJ 26 invoked the doctrine by barring the defendant in that case from raising and relying on the Limitation Act 1953. I should quote the Court of Appeal *in extenso:*

A Another way of stating the doctrine when applying it to written law is comprised in the maxim 'equity will not permit statute to be used as an engine of fraud.' It is a doctrine of wide operation. Its content was explained by Mohamed Azmi SCJ in *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 2 MLJ 291 at p 296 in the following words:

B

It is not a fraud in the common law sense, but an unmeritorious and unconscionable conduct which is known as constructive or equitable fraud (see *Spry on Equitable Remedies* (2nd Ed) at p 236.

C The doctrine, when invoked, has the effect of precluding a litigant who is guilty of unconscionable or unmeritorious conduct from relying upon a statutory provision that would defeat his opponent's case. An application of the doctrine requires a meticulous examination of the facts and circumstances of the particular case to determine whether there has been any
D inequitable conduct. The doctrine has been applied to several statutes, including those governing contracts, wills, trusts and assignments. The categories of statutes to which the doctrine may be applied are not closed and I am certainly unable to find any serious impediment in applying it to bar a litigant from raising and relying upon the provisions of the Limitation Act 1953.

E

[16] In this case it is obvious that what the defendant is trying to do is defeat the plaintiffs' claim by taking advantage of his own wrong. He must not be allowed to do that. The answer to the second issue is therefore in the negative.

F

Third Issue

If The Answer To The Second Issue Is That Tan Sri Wee And Paramill's Claims Are Not Contrary To And Thereby Not Invalidated By s. 88 Of The Land Ordinance, Whether Tan Sri Wee's Claim Is
G *Barred By s. 3 And/Or s. 26 Of The Limitation Ordinance 1952 And Therefore Paramill's Claim*

[17] The defendant's contention is that the plaintiffs' claim is statute barred as the writ was only issued on 30 June 1998, after
H a lapse of 20 years. The question is not whether the writ was issued late but whether the claim is statute barred. Section 9 of the Limitation Ordinance provides:

9. Notwithstanding anything hereinbefore contained no suit against
I a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns, not being assigns for valuable consideration, for the purpose of following in his or their hands such property, shall be barred by the length of time.

[18] In the present case the first time Tan Sri Wee was put to notice of the defendant's denial that he held the land in trust for him was in January 1998. This is evidenced by the following agreed fact:

> The defendant's solicitors by their letter dated 9 January 1998 in reply to Messrs Colin Lau & Co's letter dated 16 December 1997 to the defendant as solicitors for Tan Sri, informed for the first time that the defendant as far as he could recall, had fully paid the purchase price of the said land and therefore denied that he held the said land on trust for Tan Sri Wee. Messrs Colin Lau & Co, by their letter dated 13 April 1998, on behalf of Tan Sri Wee denied the same.

[19] Tan Sri Wee commenced this action in June 1998. There is no basis therefore for the defendant to argue that the plaintiffs' claim is time barred. On the contrary it is the defence of limitation itself that is barred by s. 9 of the Limitation Ordinance. Further, the defendant as a constructive trustee cannot plead limitation as a defence: *Khor Kuek Jin v. Haji Yasin & Ors* [1976] 1 LNS 51 FC.

[20] Article 97 of the First Schedule to the Limitation Ordinance also favours the plaintiffs. The article provides that where no period of limitation is provided elsewhere in the schedule, the period of limitation is six years from the date the right to sue accrues. Article 97 is similarly worded to art. 113 of the Indian Limitation Act 1963 (the Indian Act) except that the Indian Act provides for only three years. In their comments on art. 113 of the Indian Act the learned authors of *Sanjiva Row's The Limitation Act 1963* (8th edn) said at p. 831:

> Limitation begins to run as soon as the defendant definitely challenges the plaintiff's title to the property and casts a cloud of doubt over his title.

[21] In *MT Bolo v. MT Koklan* [1930] AIR 270 the Privy Council held that there can be no right to sue until there is accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. This decision was followed by the Federal Court in *Tan Swee Lan v. Engku Nik Binti Engku Muda* [1973] 1 LNS 156 where it was held that the period of limitation ran from the date the respondents threatened to infringe the appellant's right by saying that they refused to effect transfer of the land.

[22] In the present case the right to sue only accrued on 9 January 1998, the date the defendant wrote and claimed that as far as he could recall he had fully paid for the purchase price of the disputed land and denied that he was holding the land in trust for Tan Sri Wee. As we now know the defendant's claim that he had fully paid for the disputed land has been found to be untrue by the Court of Appeal.

[23] For the above reasons the answer to the third issue must also be in the negative. In the circumstances I entered judgment against the defendant in terms of the amended statement of claim and ordered that the registrable memorandum of transfer be executed and delivered to the plaintiffs through their solicitors within seven days from the date of judgment and for the defendant to apply for a fresh title deed to replace the original title that has been misplaced, also seven days from the date of judgment failing which the deputy registrar shall be authorized to sign the memorandum of transfer and to apply for the fresh title on behalf of the defendant.